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IN THE

Supreme Court of the United States

October Term, [redacted] 1963

No. 213

AVIS, INC., a corporation, and AVIS RENT-A-CAR SYSTEM, INC., a corporation,

Petitioners,

vs.

TANNER MOTOR LIVERY, LTD., a corporation, also known as TANNER MOTOR LIVERY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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TANNER MOTOR LIVERY, LTD., a corporation, also known as TANNER MOTOR LIVERY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on April 22, 1963.

Citations to Opinions Below.

The opinion of the United States Court of Appeals for the Ninth Circuit is unreported at this date and is printed in Appendix A hereto, *infra*, App. p. 1. The judgments of District Court Judge Thurmond Clarke dated November 28, 1962, and December 7, 1962, and reviewed by the Court of Appeals are unreported and are printed in Appendix B hereto, *infra*, App. p. 13.

No opinion was written by Judge Clarke. The judgment of District Court Judge Peirson M. Hall dated November 14, 1962, is unreported and is printed in Appendix C hereto, *infra*, App. p. 37. No opinion was written by Judge Hall.

Jurisdiction.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on April 22, 1963. The jurisdiction of this court is invoked under 28 U. S. C. Section 1254(1).

Questions Presented.

1. Whether the United States Court of Appeals for the Ninth Circuit (herein sometimes referred to as the "Court of Appeals") departed from the accepted and usual course of judicial proceedings and erred by disqualifying the regularly assigned judge and by ordering the present case reassigned to a new judge in the absence of allegations or evidence of bias or prejudice on the part of the regularly assigned judge and without notice, hearing or argument by the parties involved and without the consent of the regularly assigned judge as provided by the local rule of the court?

2. Whether the Court of Appeals, in ordering a reassignment of the present case, departed from the accepted and usual course of judicial proceedings and erred by delegating the reassignment of the case to the Chief Judge of the Southern District of California, one of the judges who participated in the proceedings below, instead of referring the reassignment to the Chief Judge of the Court of Appeals for the Ninth Circuit as provided by 28 U. S. C. Section 292(b)?

3. Whether the Court of Appeals departed from the accepted and usual course of judicial proceedings and erred by delegating reassignment of the case to the Chief Judge of the Southern District of California instead of ordering reassignment pursuant to Rule 2 of the Rules of the United States District Court for the Southern District of California, which Rule provides for the assignment of business on an impartial rotation basis?

Statutes Involved.

The statutory provisions involved are:

28 U. S. C. Section 137:

> "The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court.
>
> The chief judge of the district court shall be responsible for the observance of such rules and orders, and shall divide the business and assign the cases so far as such rules and orders do not otherwise prescribe.
>
> If the district judges in any district are unable to agree upon the adoption of rules or orders for that purpose the judicial council of the circuit shall make the necessary orders."

The rule of court involved is:

Rule 2, Rules of the United States District Court for the Southern District of California:

> "(a) In the Central Division, all actions and proceedings of a civil nature, of whatsoever kind or character, shall be numbered consecutively upon the filing of the first document in each such action or proceeding, and the judges shall, from time to

time, determine, and indicate by formal order to the clerk, the method by which each action or proceeding shall be assigned to a particular judge, to the end that over a period of time each judge shall be assigned substantially an equal amount of work. Neither the clerk nor any of his deputies shall have any power or discretion whatsoever in determining the judge to whom any matter is assigned; their actions being ministerial only. The method of assignment chosen by the judges shall be such that the judge to whom any particular matter is to be assigned, in accordance with this rule, shall not be known by or disclosed to the clerk, or any member of his staff, or to any other person, until after such action or proceeding has been filed and numbered.

(b) . . . (Omitted since it relates only to the assignment of matters in bankruptcy.)

. . . . .

(c) In all divisions of this court, the judge to whom any particular action or proceeding is assigned will thereupon have full charge of such action or proceeding; and no change in such assignment may be made except (1) by order of the judges affected, approved by the chief judge, or (2) by order of the chief judge, with the consent of the judge from whom transfer is to be made.

(d) Except as otherwise provided in Rule 63 FRCP, application for any order in an action or proceeding, including any order in regard to appellate proceedings, shall be made to the judge to whom such action or proceeding is assigned. If however, the judge to whom such cause is assigned

is not accessible, application for an order may be presented to the chief judge, or in his absence, to any other available judge, upon good cause shown, and orders may then be signed by the judge to whom such application and showing has been made. This section shall not, however, apply to bills of exceptions, findings, judgments and orders based upon decisions theretofore announced by a judge, except in the event of the disability of such judge as provided in Rule 63 FRCP."

28 U. S. C. Section 144:

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

28 U. S. C. Section 292(b):

"The chief judge of a circuit may, in the public interest, designate and assign temporarily any district judge of the circuit to hold a district court in any district within the circuit."

28 U. S. C. Section 2106:

"The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Statement of the Case.

Jurisdiction of District Court.

Petitioner Avis, Inc. (herein "Avis") is a Maine corporation and petitioner Avis Rent-A-Car System, Inc., (herein "System") is a Delaware corporation. Both have their principal place of business in Garden City, New York. Respondent Tanner Motor Livery, Ltd., (herein "Tanner") is a California corporation with its principal place of business in Los Angeles, California. The matter in controversy exceeds the sum of $10,000 and diversity of citizenship exists between all parties. Furthermore, the complaint seeks injunctive restraint in order to protect rights in federal trademarks and trade names. The District Court has jurisdiction of this case by reason of 28 U. S. C. Section 1332 and 15 U. S. C. Section 1121.

Statement of Facts.

System is a subsidiary of Avis. For many years Avis has owned the registered trademarks or trade names "Avis", "Avis Rent-a-Car System", and "Avis Rent-a-Truck System", and has operated rent-a-car and rent-a-truck businesses on a national and international basis, either itself, through licensees, or through its own subsidiaries, including System. For some time Tanner had been a licensee of Avis in several locations

in Southern California and in Las Vegas, Nevada, pursuant to several license agreements, each granting a license for an individual city or airport. These agreements specifically provide that Avis may terminate the licenses for, among other things, Tanner's failure to pay fees or file true reports. On May 28th and 31st, 1962, Avis gave Tanner written notice that its various license agreements were cancelled and terminated effective July 31, 1962, because of Tanner's repeated and continuous failure to pay fees and because false reports had been filed. By subsequent agreement the effective termination date was extended to August 15, 1962.

On and after August 16, 1962, Avis, through System, moved personnel to Southern California from other cities, established offices in Los Angeles, San Diego and Las Vegas, assembled a fleet of automobiles and otherwise commenced a rent-a-car business under the Avis name in these locations formerly licensed to Tanner. While System did not actually open offices in all of the areas formerly licensed to Tanner, it attempted to do so by negotiating for leases, attempting to place advertisements in telephone directories and other directories, and otherwise laying the groundwork for actual operations.

Despite the fact that its contractual rights with Avis had been terminated, Tanner continued and continues to do business utilizing Avis' business system and displaying to the public Avis' trademarks and trade names. On October 4, 1962, Avis and System filed a complaint in the United States District Court for the Southern District of California, Central Division, seeking an injunction to enjoin Tanner's continued use of the Avis name and system, and for damages.

Pursuant to Rule 2(a) of the Rules for the United States District Court for the Southern District of California which provides for the assignment of a judge on an impartial rotation basis, the case was assigned to Judge Thurmond Clarke.

Tanner was served with process on October 9, 1962. After taking the full 20 days to plead, on October 29, 1962, Tanner filed an answer and counterclaim in which it denied petitioners' right to terminate the license agreements and sought an injunction against Avis and System, together with declaratory and other incidental relief. At the same time Tanner (1) filed a motion for a preliminary injunction on only 10 days notice and (2) presented an *ex parte* application for a temporary restraining order to Chief Judge Peirson M. Hall. These steps were taken at a time when Judge Clarke was temporarily out of the jurisdiction and although Tanner had not taken any legal steps to protect its asserted rights for over five months from the date it first received notice of the termination of its license agreements.

Judge Hall, in the temporary absence of Judge Clarke, and without notice to petitioners, issued a temporary restraining order prohibiting Avis and System from attempting to prevent the telephone company from listing Tanner as an Avis licensee in its directories and from having System listed in such directories. Since telephone directories are published only once a year, and since no changes can be made in directories once published, Tanner, by its temporary restraining order, obtained *ex parte*, secured a determination which could not be changed for a year. On October 30, 1962, Avis and System filed an application for a modification of the temporary restraining order, but the application was denied on the same day by Judge Hall.

Tanner's motion for a preliminary injunction was set for hearing on November 9. On November 5, Avis and System filed a motion for a twelve day continuance of this hearing to November 21. The motion was based upon the ground that, since the offices, records and key personnel of Avis and System were in New York, additional time was required to obtain documentary evidence and affidavits to present to the court at the hearing scheduled for November 9. The motion for continuance was heard and denied by Judge Hall on November 7, even though continuances are normally granted as a matter of course in both federal and state courts and even though Tanner had waited several months after the termination notice had been given and weeks after the filing of the complaint to move for a preliminary injunction.

On November 9, the motion for preliminary injunction was heard. No evidence was offered by Avis or System since, as one of the attorneys for Avis and System, James S. Cline, stated in an affidavit filed with the Court in the earlier motion for a continuance, and testified at a later hearing on November 21, 1962, it was not possible on short notice to obtain factual background, exhibits, and documentary evidence with which affidavits could be prepared. Such affidavit and testimony also show that Avis's key officer in this matter had important business commitments which prevented him during the ten days involved from giving information essential to the presentation of the facts of petitioners' case. As a result, and without a hearing on the merits, Tanner's motion for a preliminary injunction was granted and a preliminary injunction in its favor was signed by Judge Hall on November 14.

1962 and entered November 15, 1962. This judgment is printed in Appendix C hereto, *infra*, p. 37.

Petitioners' reply to Tanner's counterclaim was due November 19, 1962, and was filed on that date. At that time petitioners also filed factual affidavits in support of their petition with respect to a preliminary injunction and obtained from Judge Clarke, who had then returned from vacation, an Order to Show Cause why the preliminary injunction granted earlier in favor of Tanner should not be dissolved and why an injunction should not be issued in favor of Avis and System. The Order was presented to Judge Clarke because he was the judge regularly assigned to the case. The Order to Show Cause was set for hearing on November 21, 1962. On November 21, 1962, when the matter came on for hearing before Judge Clarke, counsel for Tanner objected and argued that the matter should be heard before Judge Hall. Since Judge Hall was then out of the jurisdiction, and since Judge Clarke was still the regularly assigned judge, he overruled Tanner's objection and proceeded to hear oral evidence and consider documentary evidence on November 21 and 27. Both parties had a complete hearing before Judge Clarke. On November 28, 1962 Judge Clarke signed an Order granting to petitioners the relief sought, and on December 7, 1962, entered his formal judgment, finding as a fact that Avis and System did not have an adequate opportunity to prepare or present evidence in opposition to Tanner's motion for a preliminary injunction, and finding that Avis and System did not have a fair opportunity to be heard at the hearing held November 9. He also found that Avis had stated a *prima facie* case for relief based upon Tanner's defaults.

which were specifically non-curable under the license agreements, and that Tanner had presented no substantial defense. At that time Tanner had not pleaded defenses based on waiver and estoppel, although some aspects of those issues were mentioned at the hearing. On the basis of the uncontroverted evidence before him, Judge Clarke granted the motion of Avis and System and dissolved the injunction in favor of Tanner issued earlier by Judge Hall. Judge Clarke also issued a new injunction in favor of Avis and System enjoining Tanner from further interference with the Avis trade names and trademarks. By agreement of petitioners, this order was stayed pending. Tanner's appeal to the United States Court of Appeals for the Ninth Circuit. On April 22, 1963 that Court reversed and vacated the orders of Judge Clarke and remanded the case to Judge Hall for reassignment of the action to another judge in view of the fact that "Judge Clarke purported to find against Tanner and in favor of Avis and System on the merits" and because of alleged improper procedure followed by Judge Clarke. No claim of prejudice or bias has ever been made in this case, nor did the Court of Appeals illustrate in its opinion its reasons for concluding that Judge Clarke acted improperly other than allegedly erring in the granting of a preliminary injunction and hearing motions brought before him as the regularly assigned judge.

Reasons for Granting the Writ.

This case presents fundamental and important questions with regard to the proper administration of justice in the federal courts. The procedure and grounds for assignment and reassignment of cases are called into question, and petitioners submit, the action of the

United States Court of Appeals for the Ninth Circuit in this case has violated the traditional approach that the procedure for assignment of judges should be orderly and certain and has actually abrogated the local rule of the court that once the case has been assigned to a judge, it is to remain with that judge.

The Court of Appeals, without claim or evidence of bias or prejudice on the part of the regularly assigned judge, pre-empted the established procedure for the orderly assignment and reassignment of judges and ordered the case reassigned on its own motion.

(1) In this respect, the Court of Appeals departed from the accepted and usual course of judicial proceedings by having the case reassigned on its own motion without a hearing or argument and without evidence of bias or prejudice. The procedure for disqualifying a judge by reason of bias or prejudice under 28 U. S. C. Section 144 was not initiated or followed by any party in this action. There was no claim of misconduct on the part of Judge Clarke. In such a circumstance the Court of Appeals had no power to order the reassignment of the matter on its own motion. Such action was arbitrary and thereby suggested improper conduct on the part of both members of the bar and judges of the federal judiciary system.

The Court of Appeals pre-empted the statutory provisions for removal of a judge for bias and prejudice and ordered the matter reassigned on its own motion, without assigning reasons therefor other than its general disagreement with the approach to a case shown by the regularly assigned judge. Such conduct weakens the proper administration of the federal judicial system because it suggests that the courts of appeals

do not in fact base their decisions on the record before them.

The Court of Appeals did not act properly in this regard since Judge Clarke's only errors, if indeed there were errors, were to grant *both* parties an opportunity to be heard, to hear a motion brought before him as the regularly assigned judge, and to find in favor of Avis in accordance with a legal theory advocated by Avis before him, *i.e.*, that the preservation of the so-called "status quo" should not be a prevailing factor if the defendant cannot present a *prima facie* defense to the action. Judge Clarke's decision can be deemed no more than a judicial error, warranting nothing more than reversal of his decision by the Court of Appeals. Certainly, such a judicial error, if there was one, does not give rise to a finding of bias or prejudice warranting his removal from the case, to which he was regularly assigned in accordance with the local rules of the court. See *In re Chicago, R. I. & Pac. Ry.*, 162 F. 2d 606 (7th Cir. 1947). Apparently the Court of Appeals for the Ninth Circuit is of the opinion that, if a judge indicates after a full hearing on the merits that a party is entitled to relief and the Court of Appeals thought he was not, the judge must be excused and the case must be reassigned to a judge who can render a different opinion.

The statutes governing the disqualification (as distinguished from reassignment) of federal judges are explicit. Any party to a proceeding in a district court may disqualify the assigned judge by "a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party". (28 U. S. C. Section 144). In addition, 28 U. S. C. Sec.

tion 455 directs the judge to disqualify himself in certain specific instances. No other authority exists for disqualifying a federal district judge. No authority for effecting such disqualification can be derived from the statutory authority conferred on courts of appeals by 28 U. S. C. Section 2106. No authority for effecting such disqualification can be derived from 28 U. S. C. Section 292(b) since the purpose of that Section is to expedite judicial work and make the greatest possible use of all of the federal judges in the circuit. Section 292(b) does not authorize the assignment of a judge to replace another judge who is engaged in the disposition of a pending case. *In re Chicago, R.I. & Pac. Ry., supra,* at 611-12.

In disqualifying Judge Clarke, the Court of Appeals relied upon *Occidental Petroleum Corporation v. Chandler,* 303 F. 2d 55 (10th Cir. 1962), *cert. denied,* 372 U. S. 915 (1963) and *United States v. Ritter,* 273 F. 2d 30 (10th Cir. 1959), *cert. denied,* 362 U. S. 950 (1960). In each of these cases, the question of disqualification was decided only after one of the parties involved had challenged the impartiality of the regularly assigned judge and had presented evidence of his bias and prejudice.

If not reversed, this case gives precedent to an exercise of powers by the Court of Appeals which could lead to flagrant abuses of an orderly judicial process.

(2) Assuming, *arguendo*, that this case was a proper one for disqualification and reassignment, the Court of Appeals nevertheless ignored accepted and usual procedures for reassignment of the case. 28 U. S. C. Section 292(b) prescribes a method for reassignment and authorizes the Chief Judge of the Court of Appeals to

assign new district court judges to an action. By ignoring this provision, the Court of Appeals continued to ignore established safeguards for the impartial assignment of judges and returned the case for reassignment to the Chief Judge for the Southern District of California, *one of the two judges who participated in the controversy in the District Court.*

(3) 28 U. S. C. Section 137 requires that the business of a multi-judge district court shall be divided among the judges as provided by the rules and orders of the district court. Local rule 2(a) of the Rules for the District Court for the Southern District of California, Central Division, provides that cases shall be regularly assigned on a confidential rotation basis. This procedure is designed to insure that cases are assigned impartially and without reference to possible personal motives for having cases assigned to specific judges. Certainly this procedure should be followed in every case in the District Court and most especially, it should be followed in this case, where the Court of Appeals implied that the regularly assigned judge was subject to criticism for finding in favor of petitioners on the motion for a preliminary injunction. Instead, the Court of Appeals remanded the case to the Chief Judge of the District Court for reassignment, a procedure which allowed one judge of the two judges involved in the controversy to reassign the case. Consistent with its failure to observe that the controversy between the judges in this case, if it existed at all, was at least partially caused by the failure of one judge to grant perfunctory motions for continuances, the Court of Appeals remanded the case to that individual judge for reassignment. In delegating reassignment of

the case to the Chief Judge of the District Court, the Court of Appeals ignored local rules of court for the regular impartial assignment of judicial business, thereby giving rise to the type of problems exemplified and denounced by the opinion of this Court in *Johnson v. Manhattan Ry. Co.*, 289 U. S. 479, 505 (1933). It is submitted that this procedure has no lawful precedent and cannot be condoned as a proper exercise of judicial discretion.

Conclusion.

The question of the proper assignment of judges is not unique to this case. Important questions are presented to this Court for the preservation of stability in the assignment of cases in the federal system. For these reasons, petitioners respectfully submit that this Court should issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on April 22, 1963.

Respectfully submitted.

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June, 1963.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

Before: Hamley, Browning and Duniway, Circuit Judges

Duniway, Circuit Judge:

Tanner Motor Livery, Ltd., (Tanner) appeals from an order which (1) dissolves a preliminary injunction previously issued at it [sic] request and against Avis, Inc. (Avis) and Avis Rent-A-Car System, Inc. (System) and (2) grants at their request, a preliminary injunction against Tanner. Federal jurisdiction is predicated upon diversity of citizenship.

Certain facts are not disputed. System is a subsidiary of Avis. Avis owns certain registered trademarks: "Avis Rent-A-Car System," and "Avis." Since 1947, Tanner has been a licensee of Avis in southern California. In 1956, and since, it has been so licensed as an exclusive licensee, by separate agreements, to operate rent-a-car and rent-a-truck businesses, using Avis' marks, in twelve cities in southern California and in Las Vegas, Nevada. Thereafter, it became similarly licensed in 1960 and 1961 in six additional southern California areas. Avis claims that, pursuant to power to do so, reserved in the agreements, it terminated Tanner's rights under each of the agreements, for cause. The validity of this termination is vigorously contested by Tanner. The termination was announced in a letter dated May 31, 1962, which states: "The termination is based on your failure to pay fees under the Exclusive License Agreement referred to." The

letter cites paragraphs 3.1, 3.11 and 4.1 of the agreement. Paragraph 3.1 requires that Tanner report to Avis, by the 20th of each month, "the sum of all total time and mileage charges less all customer discounts . . . during the preceding month." Paragraph 3.11 requires that it pay certain fees monthly. Avis relied upon a further provision (paragraph 9 of the contracts), that "Except in the case of failure to pay fees required . . . or to make true reports under Section 3.1," Tanner could cure violations during 30 days following receipt of intention to terminate. Tanner claimed that it was not in default, and that its breaches, if any, were waived. Following some negotiations, Avis extended the time of termination from July 31, 1962, to August 15, 1962. This involved no waiver by either party of its rights, if any.

Beginning August 16, Avis, through its subsidiary, System, started to operate an "Avis" rent-a-car business in parts of Tanner's territory; or, as Avis claims, former territory. At the same time, Tanner continued to operate as before, using the Avis name. It is unquestioned that the southern California territory is a very valuable one, and that the exclusive right to operate in that territory as an Avis licensee is also very valuable. Important, if not essential, to the conduct of the business are such matters as listings in telephone and other directories, space in airport terminals and other locations, advertising, and the other familiar paraphernalia of such a business. Avis notified the telephone companies and various others in the area that Tanner was no longer authorized to use its name, and sought to have System listed as the "Avis" operator.

It was endeavoring to obtain space for System at the Los Angeles International Airport. It shifted certain automobiles to the southern California area, and placed orders for the purchase of others. In short, Tanner was trying to continue to operate as an Avis licensee, and Avis was trying to prevent its doing so and to get its subsidiary, System, established in the business in Tanner's place. This was the state of affairs when this action was filed.

On October 4, 1962, Avis and System filed their complaint. It alleges many of the foregoing facts, and asks for a permanent injunction, preventing Tanner from using the Avis names or marks, requiring return to Avis of all of its forms and advertising matter in Tanner's possession, and requiring Tanner to notify the post office, Western Union, the telephone companies, etc., that all "Avis" messages must go to System or other Avis licensees. There was also a request for a preliminary injunction, but no steps were taken to obtain one. The district court for the Southern District of California, Central Division, does not use the master calendar system, and the case was assigned, when filed, to Judge Thurmond Clarke.

On October 29, 20 days after service of summons upon it, Tanner filed its answer. It also filed a counterclaim, in which it alleged that the licensing agreements were in effect, that it had the exclusive right to use the Avis marks in the territories involved, that it had built up a very valuable business as an Avis licensee, and that Avis and System were endeavoring, without justification, to destroy it. It sought damages, declaratory relief, moneys allegedly collected for it by Avis from customers and not paid over, and a prelim-

inary and permanent injunction restraining Avis and System from competing with it and from advising others that they, rather than Tanner, are the only authorized Avis operators in the territory.

At the same time, Tanner filed a notice of motion and motion for a temporary restraining order and for a preliminary injunction, which latter was set for hearing on November 9, 1962, ten days later, in compliance with local rules. (Rule 3(b)). Affidavits and points and authorities were filed in support of the motions Judge Clarke was away on an extended vacation, and Chief Judge Peirson M. Hall issued a temporary restraining order, prohibiting Avis and System from attempting to prevent a telephone company from listing Tanner as an Avis licensee in its directories, and to have themselves so listed.

On October 30, Avis and System filed an application for a modification of the temporary restraining order, and this was denied on the same day by Chief Judge Hall.

On November 5, Avis and System filed a notice of motion and motion, with a supporting affidavit, for continuance until November 21 of the hearing on Tanner's motion for preliminary injunction. They obtained an order from Judge William C. Mathes shortening the notice of motion period, the motion being set for hearing on November 7. The motion was based upon the contention that, because Avis' main office, officers and records were in New York; additional time was required to obtain evidence, particularly an affidavit of one Morrow, Avis' Vice President and General Manager. On November 7, Tanner filed opposing affi-

davits and authorities. The motion for continuance was heard and denied by Chief Judge Hall on that day.

On November 9, the motion for preliminary injunction was heard. Additional affidavits were filed in support of the motion. Tanner also showed that Morrow was in Los Angeles on November 7, endeavoring to get a lease at the airport. There was also some testimony as to Avis' and System's activities in the area. No other evidence was offered by Avis or System, on the ground that they were not able to offer any. This, in spite of the facts (1) that Avis gave notice of termination on stated grounds, on May 31, over five months before, (2) that Avis filed the complaint on October 5, over a month before, and (3) that Morrow had been in Los Angeles two days before, on the very day when counsel sought a continuance on the ground that time was needed to obtain his affidavit.

On November 14, Chief Judge Hall made and filed his findings of fact and conclusions of law, and preliminary injunction, restraining Avis and System from interfering with Tanner's business as Avis' licensee, and from conducting a competing business until final hearing or further order of the court. It indicated that while the injunction was in effect, Tanner should comply in all respects with the contracts.

On November 19, a Monday, Judge Clarke returned from his vacation. That morning, Avis and System filed their reply to Tanner's counterclaim, and obtained from Judge Clarke an order to show cause, returnable two days later, on November 21, why Chief Judge Hall's preliminary injunction should not be dissolved and a preliminary injunction issued in favor of Avis and Sys-

tem. This order was issued by Judge Clarke at 9:10 a.m. on November 19. In support of this order and application, four affidavits and a memorandum of points and authorities were filed. One affidavit, by Morrow, attempted to show numerous breaches by Tanner of the license agreement, including several that were not mentioned in Avis' notices to Tanner of termination. One "affidavit," that of Cline, Avis' and System's attorney, which sought to show that the hearing before Judge Hall was a "default" hearing, because Cline had been unable to obtain necessary affidavits, is not sworn to, but purports to be made "under penalty of perjury," a procedure not known to the federal courts.

On November 21, when the matter came on for hearing, Tanner filed two memoranda in opposition, one dealing with the merits of the motions, and the other urging that the matter should be heard before Chief Judge Hall. It also objected to having the matter heard on only two days' notice. Judge Clarke overruled the objection, stating that Judge Hall was in Kansas and could not "physically or mentally hear this case." (The statement would have been correct if the word "today" had been added to it. Judge Hall returned in time to have heard the matter if the usual 10 day notice, normally required by local rule, had been given.) Avis and System then offered in evidence a telegram from a telephone company in Palm Springs, stating that, unless the preliminary injunction were modified, it could not list Avis or System in a directory that was about to be published. They then rested. Tanner offered, and the court received, oral testimony, both as to the alleged breaches and as to the current status of the par-

ties' businesses. It also put Cline and Morrow on the stand, primarily to show that the evidence in the Morrow affidavit, and Morrow himself, were available before the hearing of Tanner's motion by Chief Judge Hall on November 9. The hearing was continued to November 27, and completed on that day. Tanner filed a further memorandum in opposition.

On November 28, Judge Clarke granted both of Avis' and System's motions. He made and filed his formal findings, conclusions, and preliminary injunction, on December 7. His findings include a finding that Chief Judge Hall was away on November 20 and 21; but not on November 19 or after November 21. He also found in favor of Avis and System, in detail, on the merits. His injunction grants them substantially all injunctive relief that they could have obtained after a plenary trial on the merits.

Tanner appealed on December 10, and we stayed Judge Clarke's order pending appeal, so that Chief Judge Hall's order is now in effect. We conclude that Judge Clarke's order must be reversed.

1. It is so well settled as not to require citation of authority that the usual function of a preliminary injunction is to preserve the *status quo ante litem* pending a determination of the action on the merits. The hearing is not to be transformed into a trial of the merits of the action upon affidavits, and it is not usually proper to grant the moving party the full relief to which he might be entitled if successful at the conclusion of a trial. This is particularly true where the relief afforded, rather than preserving the status quo,

completely changes it. Yet this is what Judge Clarke's order does, and it is based upon findings that purport to determine that Tanner breached the contracts, that its breaches could not be cured, and that Tanner has no substantial defense to the action. These are matters to be determined at trial, not upon the motion for preliminary injunction.

It has been said, and we agree, that: "The status quo is the last uncontested status which preceded the pending controversy." (*Westinghouse Elec. Corp. v. Free Sewing Mach. Co.*, 7 Cir., 1958, 256 F. 2d 806, 808). Here that status quo is that Tanner was, and had been for many years, an Avis licensee, operating an extensive business from which both Tanner and Avis were realizing profits. (See *Lea v. Vasco Products, Inc.*, 5 Cir., 1936, 81 F. 2d 1011; *Maison Daron Société Anonyme v. Arnold*, 2 Cir., 1924, 296 Fed. 387). Tanner was endeavoring to continue to so operate. Avis sought to change that status; Judge Clarke's order grants it what it seeks.

We are not to be understood as stating that the foregoing principles are hard and fast rules, to be rigidly applied to every case regardless of its peculiar facts. The infinite variety of situations in which a court of equity may be called upon for interlocutory injunctive relief requires that the court have considerable discretion in fashioning such relief. But the court's discretion is neither arbitrary nor unlimited; it is to be guided by the principles long established in courts of equity, and a departure from those principles is justified only where the practicalities of the problem with which the court is faced require it. We can find no such re-

quirement here. Judge Hall applied these principles,[1] Judge Clarke did not. The issuance of Judge Clarke's order was an abuse of his discretion.

2. The manner in which the order appealed from was made was also an abuse of discretion. We have heretofore held that each judge of a multi-judge district court has the same power and authority as each other judge. (*Casiner v. First Nat'l Bank*, 9 Cir., 1960, 278 F. 2d 370). We there held that, where judge A of such a court had denied a motion for summary judgment, and the case was then assigned to judge B, for trial, judge B could grant the same motion. This is but an application, in the case of a multi-judge court, of the well-established rule that a district judge always has power to modify or to overturn an interlocutory order or decision while it remains interlocutory. But in that case we also reiterated our prior statement that "one judge should not overrule another . . . except for the most cogent reasons." (*Id.* at 380.) We

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[1]Judge Hall's findings include the following:

"That the preservation of the 'status quo' of the parties, pending the outcome of the litigation of the matter on its merits, requires that defendant Tanner be the sole and exclusive one to operate a U-Drive rent-a-car business under the trade name and trademark and style of Avis, Avis Rent-A-Car System, or any contractions thereof.

* * * * *

"That the preservation of the status quo of the parties hereto in accordance with the manner in which they have conducted themselves for over fifteen years under the covenants, terms and conditions of the aforesaid nineteen exclusive license agreements will result in a minimum amount of harm to the plaintiffs Avis and Avis System; That in connection therewith, the court finds that both parties should keep accounting records of the business done by the respective parties hereto in connection with the operation of the U-Drive rent-a-car business under the name Avis, Avis Rent-A-Car System or any contractions thereof."

also said: "This court is therefore aligned with those holding that the power of each judge of a multi-judge court is equal and co-extensive; it permits one to overrule the order of another under proper circumstances, and where one judge has done so the question becomes one of the proper exercise of judicial discretion." (*Id.* at 380).

An order granting or denying a preliminary injunction is made appealable, as of right, by statute. (28 U.S.C. § 1292 (a)(1)). In this respect, it differs from most interlocutory orders, such as, for example, the order denying a motion for summary judgment involved in *Castner, supra.* This does not mean that an order granting a preliminary injunction cannot be reconsidered by the district court if an appeal is not taken. But we think that it does mean that, in such a case, the requirement that there be "the most cogent reasons" for its reconsideration by another judge is peculiarly applicable. Thus, in *Hardy v. North Butte Mining Co.*, 9 Cir., 1927, 22 F. 2d 62, we reversed an order, by a second judge, discharging a receiver appointed by another judge. An order appointing a receiver is also appealable, (28 U.S.C. § 1292(a)(2)), and has been since 1900 (31 Stat. 660). We emphasize the appealability of the order because it afforded Avis and System a means whereby they could have had Judge Hall's order reviewed by this Court. There was therefore no necessity for their resorting to the district court, much less to a different judge, to obtain review if they felt that Judge Hall had erred.

In *Hardy, supra*, this Court considered at length the indelicacy, the "unseemly struggles to obtain a hearing

before one judge in preference to the other," the impropriety, the "unseemly conflicts" likely in procedure such as here involved. We also discussed the necessity for "dignified and orderly procedure of the courts." Here, no showing was made why appellees' motions could not be heard in due course by Judge Hall, who issued the first injunction, or why the matter should be heard upon two days' notice rather than the customary ten specified in the rules. The procedure was subject to all of the objections discussed by us in *Hardy*.

Moreover, there was no showing of changed circumstances between November 14, when Judge Hall issued his injunction, and November 19, when Judge Clarke returned from his vacation. We think that, in the absence of changed circumstances, and except there be some other "most cogent reason," when a judge makes or denies an interlocutory order, and when an appeal lies, as of right, from such an order, it should not be reconsidered, even by the judge who first made the order, much less by another judge. Orders of United States Courts, deliberately made, after proper notice and hearing, and subject to review by this Court, are not to be lightly changed by any judge of the trial court.

3. The only other reason suggested is appellees' claim that they did not get a full hearing before Judge Hall, because they did not have time to prepare their evidence. In this Court, they have referred to that hearing as one by default. This is an overstatement. If appellees were not in a position to present their evidence as they claim, it appears to us that the fault lies with them, not with Judge Hall or with Tanner. The dispute was months old at the time of the hearing;

appelles had initiated it, and stated their grounds, as early as May 31; and their key witness, Morrow, could have appeared and testified. For reasons best known to themselves, appellees chose not to produce him.

4. Appellees urge, in support of Judge Clarke's order, that the evidence shows that Tanner could not recover in any event, and that, if it could, its rights could not be protected by an injunction, its sole remedy being for damages. These contentions, which go to the merits, may ultimately prevail. We do not pass upon them, except to state that we do not think that the answers are as clear as appellees seem to think.

5. In his findings of fact, Judge Clarke purported to find against Tanner and in favor of Avis and System on the merits. In view of this fact, and of what we have said about the procedure, we think it better that the trial of the action be before another judge. We have power to so order. (28 U.S.C. § 2106; see *United States v. Ritter*, 10 Cir., 1959, 273 F.2d 30; *Occidental Petroleum Corp. v. Chandler*, 10 Cir., 1962, 303 F.2d 55, *cert. denied*, 31 U.S.L. Week 3261 (U.S. Feb. 18, 1963); *cf. United States v. United States District Court*, 6 Cir., 1954, 209 F.2d 575; *Gladstein v. McLaughlin*, 9 Cir., 1955, 230 F.2d 762.)

The orders of November 19, 1962, and December 7, 1962, are reversed and vacated in all respects, and the matter is remanded, with direction that the Chief Judge for the Southern District of California assign the action, and all further proceedings therein, to another judge.

APPENDIX B.

Order of Judge Thurmond Clarke Granting Plaintiffs' Motion for Preliminary Injunction, and Dissolving Preliminary Injunction Granted to Defendant on November 15, 1962.

This matter having come before the court for hearing on plaintiffs' order to show cause why the preliminary injunction issued in favor of defendant and entered on November 15, 1962 should not be dissolved, and why a preliminary injunction should not be issued in favor of the plaintiffs;

The motion having been argued and submitted for decision on November 27, 1962;

It is now ordered that plaintiffs' motion for a preliminary injunction, and to dissolve the preliminary injunction granted to defendant on November 15, 1962, is hereby granted. Plaintiffs are directed to lodge with the Clerk of the Court a proposed formal order within five days, pursuant to local rule 7.

It Is Further Ordered that defendant's bond in the amount of $25,000., approved on November 14, 1962, is hereby exonerated. Further, plaintiffs are hereby ordered to file bond or make a cash deposit, pursuant to local rule 8(e), within five days after the entry of the lodged order. Said bond or deposit to be in the amount of $50,000. and to be for the payment of costs and damages suffered by any party found to have been wrongfully enjoined.

It Is Further Ordered that the Clerk shall this day serve copies of this order by United States mail upon the attorneys for the parties appearing in this cause.

Dated November 28, 1962.

THURMOND CLARKE
United States District Judge.

Order of Judge Thurmond Clarke Dissolving Preliminary Injunction Granted to Defendant November 15, 1962, Findings of Fact, Conclusions of Law and Preliminary Injunction Dated December 7, 1962.

This matter came on duly for hearing on November 21 and 27, 1962, before the Honorable Thurmond Clarke, Judge Presiding, on plaintiffs' Order to Show Cause. The plaintiffs appeared by their attorneys, Adams, Duque & Hazeltine, by Henry Duque, Esq. and James S. Cline, Esq. Defendant appeared by its attorneys, Jack E. Hildreth, Esq., Tudor Gairdner, Esq., Thomas R. Barry, Esq., Robert E. Willard, Esq. and William F. Peters, Esq. Evidence both oral and documentary was taken on behalf of each of the parties desiring to present same and the matter was submitted to the Court for its consideration. The Court having considered the verified Complaint, the Answer thereto, the verified Counter-claim, the Reply thereto, the motions and affidavits heretofore filed by plaintiffs and defendant, and the prior orders and proceedings herein, and all of the same having been offered and received in evidence, and having heard oral evidence in open court, the Court now makes its Finding of Fact, Conclusions of Law and Judgment as follows:

FINDINGS OF FACT

1. The matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs.

2. Plaintiff Avis, Inc. (hereinafter referred to as "Avis") is a Maine corporation with its principal place of business in Garden City, State of New York. Plaintiff, Avis Rent-A-Car System, Inc. (hereinafter re-

ferred to as "System, Inc.") is a Delaware corporation with its principal place of business in Garden City, State of New York and is a wholly-owned subsidiary of Avis. Defendant Tanner Motor Livery, Ltd. (hereinafter referred to as "Tanner") is a California corporation with its principal place of business in Los Angeles, State of California. Diversity of citizenship exists between all plaintiffs and defendant Tanner.

3. On October 4, 1962 plaintiffs filed their verified Complaint herein and the same was assigned to Judge Thurmond Clarke. On October 29, 1962, defendant filed herein its Answer, verified Counter-claim, Motion for a Preliminary Injunction and affidavits in support thereof and served the same on plaintiffs' counsel after 5:30 P.M. on said date. The hearing on defendant's motion was set for November 9, 1962. Prior to said hearing, plaintiffs duly moved for a continuance thereof on the ground that they were unable to properly prepare for and oppose defendant's motion. Plaintiffs' motion for a continuance was denied. Defendant's motion for a preliminary injunction came on for hearing on November 9, 1962, before Judge Peirson M. Hall, during the temporary absence of Judge Thurmond Clarke. Plaintiffs were unable to file affidavits or present other evidence in opposition to defendant's motion for a preliminary injunction, and as a result thereof, defendant's motion was heard on defendant's affidavits only and was granted. A preliminary injunction was entered herein in favor of defendant on November 15, 1962.

4. Plaintiffs did not have an adequate opportunity to prepare or present evidence in support of their Complaint or in opposition to defendant's motion for a

preliminary injunction until November 19, 1962, the date on which their Reply to defendant's Counter-claim was due, and did not on November 9, 1962, have a fair opportunity to be heard. On November 19, 1962, plaintiffs filed and served their Reply to defendant's Counter-claim, an Order to Show Cause and factual affidavits in support thereof. Plaintiff's Order to Show Cause came on for hearing on November 21 and 27, 1962, at which time affidavits and oral and documentary evidence was offered and received into evidence by both plaintiffs and defendant. Judge Peirson M. Hall left Los Angeles, California on November 20, 1962 and was not within the jurisdiction of this Court on November 21, 1962.

5. Avis is the exclusive owner of, and has the right to use and to license others to use, a plan or system for conducting the business of renting vehicles, including the renting of passenger motor vehicles, without drivers, hereinafter called "rent-a-car business," and the renting of trucks, without drivers, hereinafter called "rent-a-truck business," which plan or system consists, among other things, of uniform methods of operation, accounting, advertising service and publicity, courtesy and credit card service, kind and amount of insurance protection, method of procuring insurance protection and equipment, style and character of equipment, furnishings and appliances used in the conduct of said business, methods of procuring business and referral of business, and the right to use the name "Avis," "Avis System," "Avis Rent-a-Truck System" and "Avis Rent-a-Car System," all of which constitute a part of said system, which system is generally known as Avis Rent-a-Car System. System, Inc., is the principal op-

erating subsidiary through which Avis itself uses the Avis Rent-a-Car System in the conduct of the rent-a-car business in various areas of the United States.

6. Avis, through its predecessors in interest, commenced its rent-a-car business in or about 1945, and has used and licensed others, directly or through wholly-owned subsidiaries such as System, Inc., to use its Avis Rent-a-Car System since in or about 1947. At the present time, Avis licenses the Avis Rent-a-Car System itself and in those areas in which Avis uses the Avis Rent-a-Car System in carrying on a rent-a-car business, does so through System, Inc., or other wholly-owned subsidiaries. At all times herein mentioned Avis has operated its business as aforesaid on a national and international basis and has used or authorized others to use said system in each of the States of the United States of America and in more than 30 foreign nations, including Canada, Great Britain, France, Italy, West Germany, Spain, Belgium, Ireland, Holland and Israel.

7. Avis is the owner of United States trademark "Avis Rent-a-Car System," Service Mark No. 615013; the United States trademark "*Avis*," Service Mark No. 615013 as amended March 13, 1956; and United States trademark "Avis," Service Mark No. 703700. The foregoing trademarks were first used August 30, 1945 in commerce, September 30, 1945.

8. At the time Avis, through its predecessors in interest and licensees and through System, Inc., adopted and used said trademarks and names, no other person, firm or corporation had used or employed the said, or any similar form of trademark, name or

device, upon or in connction with the rent-a-car business, the rent-a-truck business or other similar business or service in the State of California or elsewhere in the United States. Avis is now the owner and entitled to the exclusive use of said trademarks, names and devices and of said Avis-Rent-a-Car System.

9. The adoption and use of said trademarks, names and devices by Avis in connection with the rent-a-car business was new and original, and by constant and extensive use thereof in connection with the business and services of Avis and its duly authorized licensees, and by Avis' constant and widespread advertising and promotion at a cost which in each of the past two years has amounted to more than $1,000,000 per year, said trademarks, names and the Avis Rent-a-Car System have become and now are identified and associated with the business, products and services of Avis both in the public mind and in the minds of consumers generally. In addition, the business and services of Avis have acquired an international reputation for quality, and said trademarks and names have been and are generally taken as distinctive marks of excellence, and the business and services which are conducted and sold under said trademarks and names are readily taken as superior and are taken to be the business and services of Avis and its duly authorized licensees, all of which facts were and are well known to defendant. For more than 10 years past, Avis or System, Inc., has used in certain parts of California and Nevada, and has licensed others to use in other parts of California and Nevada, said trademarks and names and the Avis Rent-a-Car System.

10. Prior to the year 1947, Tanner was in the business of renting and leasing automobiles, without drivers, to the public generally under the firm name and style of Tanner Motor Livery, Ltd.

11. In 1952 defendant became a licensee for the Avis Rent-A-Car System in Los Angeles and Hollywood. Thereafter defendant became a licensee of the Avis Rent-A-Car System in other areas. In or about 1956 the various agreements then in force under which defendant was licensed to use the Avis name and Avis Rent-A Car System were cancelled and terminated by mutual agreement and consent.

12. Thereafter at various time in or about 1956, a corporate predecessor of Avis entered into separate agreements with defendant entitled "Exclusive License Agreement" pursuant to which defendant was granted a license, subject to the terms and conditions thereof, to use the Avis Rent-A-Car System in the conduct of a rent-a-car business in the following cities and locations:

a. Beverly Hills, California
b. Burbank, California
c. Coronado, California
d. Glendale, California
e. Lancaster, California
f. Long Beach, California
g. Los Angeles and Hollywood, California, and the Los Angeles International Airport
h. Palm Springs, California
i. Pasadena, California
j. San Diego and La Jolla, California
k. Santa Barbara, California
l. Santa Monica, California
m. Las Vegas, Nevada

13. On or about September 14, 1956, said corporate predecessor of Avis assigned and transferred all of its right, title and interest in and to each of the agreements hereinabove referred to in paragraph 12 to Avis and ever since said date Avis has been the owner thereof.

14. On or about the following dates, Avis entered into additional separate agreements with defendant entitled "Exclusive License Agreement" pursuant to which defendant was granted a license, subject to the terms and conditions thereof, to use the Avis Rent-a-Car System in the conduct of a rent-a-car business in the following cities and locations:

Date	City and Location
July 15, 1960	Oxnard, California, and the Oxnard Airport
March 1, 1961	Ventura and Ojai, California, and the Ventura and Ojai airports
June 1, 1961	Culver City and Inglewood, California, and airports and railroad stations serving said cities
June 1, 1961	South Gate, California, and airports and railroad stations serving said city
June 1, 1961	Vernon, Huntington Park and Palmdale, California, and the airports and railroad stations serving said cities
August 1, 1961	Disneyland, California and the Disneyland Heliport

15. Each of the agreements hereinabove referred to in paragraphs 12 and 14, although differing in certain respects not here material, is in the same general form and provides, among other things, as follows:

> "16. *Changes Approved By Convention.*
>
> Licensee agrees that Licensor, with the prior approval of a majority of licensees attending any Business Convention, may make any changes in the terms and provisions of this Agreement when such changes are made in System Licenses generally, other than changes in Section 14, and that such changes shall be as binding on the parties hereto as if included in this original Agreement."

From time to time since their execution each of said agreements has been duly amended by the vote and prior approval of a majority of the licensees of plaintiff attending a Business Convention. Except in certain respects not here material, a true and correct copy of said agreements entitled "Exclusive License Agreement" as amended through May, 1962, is attached to plaintiffs' Complaint marked Exhibit "A". Each of said agreements as amended through May, 1962, provides, among other things, as follows:

> "WHEREAS, Licensor (Avis) is the exclusive owner of, and has the right to use and to license others to use, a plan or system for conducting the business of renting vehicles, including the renting of trucks, without drivers, hereinafter called 'rent-a-truck business' and renting passenger motor vehicles, without drivers, hereinafter called 'rent-a-

car business', which plan or system consists, among other things of uniform methods of operation, accounting, advertising service and publicity, courtesy and credit card service, kind and amount of insurance protection, method of procuring insurance protection and equipment, style and character of equipment, furnishings and appliances used in the conduct of said business, methods of procuring business and referral of business, and the right to use the name 'Avis' 'Avis System', "Avis Rent-a-Truck System' and 'Avis Rent-a-Car System', all of which constitute a part of said system, which system is generally known as Avis Rent-a-Car System and is sometimes referred to hereinafter as the 'System'; and

"WHEREAS, the Licensee is desirous of obtaining a license to use the System, including the name 'Avis' in the conduct of a rent-a-car business at the location and covering the area hereinafter set forth;

NOW, THEREFORE, in consideration of these premises, it is agreed by and between the parties hereto as follows"

* * *

"Licensee does further covenant and agree:

"3.1 *Monthly Reports.* To report to Licensor in writing before the 20th day of each month, (a) the sum of all total time and mileage charges less all customer discounts stated on the respective rental agreements (e.g. line 46 of Avis OPR 14 (Rev. 1960)) assessed by Licensee in its rent-a-car business during the preceding calendar month;

and (b) the number of cars then on rental or ready and available for rental on the last day of such preceding month. Such reports shall be in the form prescribed by Licensor and certified as true by Licensee, its authorized officer, agent or employee.

* * * * *

"3.11 *Administrative and Advertising Fees.* To pay as administrative and advertising fees before the 20th day of each month 5% of the amount reported by Licensee for the preceding month under Section 3.1(a) hereof. Payment shall be made to Licensor who shall safeguard and account for the Advertising portion thereof as required by Section 4.1 hereof."

With respect to the breach of said covenants by defendant, Section 9 of each of said agreements provides in part:

"*Breach of Agreement by Licensee.*

In the event Licensee shall violate any of the terms, covenants, conditions or provisions hereof, Licensor may at its option terminate this Agreement by giving to Licensee, at least 30 days prior to such termination date, written notice of its intention to so terminate, specifying therein the date on which such termination shall become effective. Except in the case of failure to pay fees required under this agreement or to make true reports under Section 3.1, the Licensee may cure such violation during such 30-day period, in which event the Licensor's notice of termination shall be of no effect. . . ."

With respect to defendant's right to use the Avis-Rent-A-Car System in the event of termination, Section 7 of each of said agreements provides:

> "*Reversion to Licensor of All Rights on Termination.*
>
> In the event of termination, cancellation or suspension of this Agreement, all rights of Licensee hereunder shall thereupon terminate, and Licensee shall immediately thereafter cease to use, by advertising or otherwise, the System or any part thereof, or any forms, systems, slogans, marks, symbols or devices used in connection with the System, including among other things, 'Avis Rent-a-Car System, Licensee' or the name 'Avis' or any combination of words, marks or colors similar thereto in any manner whatsoever; and to return forthwith to Licensor all unused Avis System Standard Rental Agreements, forms, advertising matter, bulletins, procedures, manuals of operation, and Commercial Customer Information Sheets which have been received from Licensor and receive due credit therefor."

16. Prior to May, 1962, and despite demand by Avis, defendant failed and refused to make true reports under Section 3.1 of said agreements, and each of them, and failed and refused to pay the fees required to be paid under Section 3.11 of said agreements, and each of them. Said failure to pay fees by defendant constituted material breaches of said agreements, the performance of which were essential to the business of Avis and to enable Avis to meet and perform the obligations of its business and to operate a rent-a-car business on a national basis.

17. Since prior to October, 1961, defendant was and had been delinquent in paying the monthly fees due under Section 3.11 of each of said Exclusive License Agreements. The number of days of defendant's delinquency in the payment of said fees increased consistently during the period from January, 1962, through May, 1962. On several occasions from October, 1961, through May, 1962, Avis notified defendant in writing that it was delinquent and in default in the payment of the monthly fees due under each of said Exclusive License Agreements and demanded that the same be paid and kept current. On May 31, 1962, defendant had not paid the fees due April 20 or May 20, 1962, under Section 3.11 of said Exclusive License Agreements, or any of them. On May 31, 1962, defendant mailed the fees due May 20, 1962, to Avis, and the same were received by Avis on June 2, 1962. Defendant did not pay or attempt to pay the fees due to Avis under each of said Exclusive License Agreements on April 20, 1962, until on or after June 22, 1962.

18. During the period defendant was a licensee of the Avis Rent-A-Car System, Avis collected monies for defendant under its national credit card and central billing program, sometimes referred to as the "Avis Visa plan." Pursuant to agreement between Avis and its licensees including defendant, funds so collected by Avis were handled on a trust fund basis and were not subject to offset. All funds collected by Avis on defendant's behalf prior to August 22, 1962, have been paid to defendant. Pursuant to written notice to defendant, funds collected by Avis since August 22, 1962, have been held by Avis in a special account pending an accounting herein between the parties.

19. During the period from January 1, 1959, to June 6, 1960, defendant failed to make true reports under Section 3.1 of each of its Exclusive License Agreements. As a result of an audit by Arthur Young & Company in August, 1960, $9,641.50 was found to be due from defendant to Avis by reason of said false reports. Said sum was paid by defendant to Avis in installments, the last of which was received by Avis in January, 1962.

20. On or about May 28 and 31, 1962, Avis terminated each of said agreements by giving to defendant written notice of plaintiff's intention to terminate said agreements effective July 31, 1962. Thereafter Avis, with the consent of defendant, extended the effective date of cancellation of said agreements from July 31, 1962, to August 15, 1962.

21. At various times in 1961, Avis entered into separate agreements with defendant entitled "Exclusive Truck License Agreement" pursuant to which defendant was granted a license, subject to the terms and conditions thereof, to use the Avis Rent-a-Car System in the conduct of a rent-a-truck business in the following cities and locations:

a. Beverly Hills, California
b. Burbank, California
c. Coronado, California
d. Glendale, California
e. Lancaster, California
f. Long Beach, California
g. Los Angeles and Hollywood, California
h. Palm Springs, California
i. Pasadena, California
j. San Diego and La Jolla, California

k. Santa Barbara, California
l. Santa Monica, California
m. Las Vegas, Nevada
n. Oxnard, California
o. Ventura and Ojai, California
p. Culver City and Inglewood, California
q. Disneyland, California
r. South Gate, California
s. Vernon, Huntington Park and Palmdale, California.

22. Each of the agreements hereinabove referred to in paragraph 21 is in the same general form. Section 7 of each of said agreements provides in part:

> "This agreement shall automatically terminate, together with all rights and interests of Licensee hereunder, without any notice to Licensee if (a) Licensee holds an Exclusive License Agreement to use the System for the conduct of a rent-a-car business for all or a part of said territorial limits described herein and said agreement is terminated by Licensee with or without cause or is terminated by Licensor with cause based upon a breach of such agreement by Licensee. . . ."

By reason of said provision and the matters hereinabove referred to in paragraphs 16 through 20, each of said Exclusive Truck License Agreements terminated on August 15, 1962, and is of no further force or effect.

23. Since May, 1962, defendant has made monthly reports to Avis and has paid or tendered to Avis the fees shown to be due Avis on said reports. The

monthly fees payable under Section 3.11 of said Exclusive License Agreements are not an advance payment but rather are based upon the time and mileage charges received by the licensee during the preceding calendar month. From August 15, 1962, to November 9, 1962, Avis refused to accept the monthly payments tendered by defendant and pursuant to written notice to defendant, has held the same in a special account pending an accounting herein between the parties.

24. At all times herein mentioned Avis and System, Inc., duly performed all of the stipulations, conditions and agreements in each of said Exclusive License Agreements to be performed on their part at the time and in the manner specified therein.

25. It is not true that Avis terminated the license agreements of defendant as a part of a conspiracy or with the intent and purpose of appropriating to itself or to System, Inc., defendant's customers, personnel, good will, business or reputation as alleged in defendant's Counter-claim. In this connection, defendant has since prior to 1947 engaged in various public transportation activities including the leasing of automobiles without drivers and has to the present time promoted, conducted and advertised its business under the name "Tanner" as well as under the name "Avis" and as an Avis licensee. Defendant is well suited to continue to operate its rent-a-car and rent-a-truck business under the name of "Tanner" if it so desires.

26. At no time mentioned herein have plaintiffs, or either of them, contacted or sought to induce or persuade defendant's employees or agents to leave defendant's employ or to become employees of plaintiffs or

others engaged in a competing business to that of defendant.

27. The value to Avis of the exclusive right to use said trademarks, names the Avis Rent-a-Car System and the good will attached thereto is many thousands of dollars and exceeds the sum or value of $10,000.00.

28. Since August 15, 1962, defendant has continued to conduct its rent-a-car and rent-a-truck business under the Avis trademarks and trade names and Avis Rent-a-Car System in the cities and locations hereinabove mentioned in paragraphs 12, 14 and 21. In so conducting its business, defendant has repeatedly caused consumers and the public generally to believe that it was a duly authorized Avis licensee and a part of the Avis Rent-a-Car System. Defendant's conduct is calculated to and does mislead and deceive consumers, the public in general and those persons utilizing defendant's rent-a-car and rent-a-truck business into the belief that the business and services of defendant were and are the business and services of Avis and were authorized by Avis to be conducted under the aforesaid trademarks, names and Avis Rent-a-Car System, and the acts and representations of defendant were designed by defendant and in fact did, and now do, divert to itself the customers and trade of System and Avis' licensees. By reason thereof, Avis and the businesses of System, Inc., and the Avis licensees have suffered and will continue to suffer great and irreparable injury, for which plaintiffs have no plain, speedy or adequate remedy at law.

29. Ever since August 15, 1962, plaintiffs have demanded that defendant cease and desist from the use

of said trademarks, names and Avis Rent-a-Car System and from said acts and representations. Defendant refused and still refuses to discontinue the use of said trademarks, names and Avis Rent-a-Car System and threatens to and will, unless enjoined by this Court, continue to use said trademarks, names and System in connection with its rent-a-car and rent-a-truck business for the purpose of deceiving and misleading consumers and the public in general, whereby plaintiffs, the licensees of Avis and the public generally will suffer irreparable damage for which plaintiffs have no plain, speedy or adequate remedy at law.

30. Defendant has committed and will in the future commit additional acts which would cause further immediate and irreparable injury to plaintiffs and other Avis licensees during the pendency of this action unless restrained and enjoined and include, but are not limited to injuring plaintiffs' business and reputation, good will, placing competing telephone listings and advertisements and creating confusion in the minds of the public generally. Damages accruing to plaintiffs by reason thereof are difficult to measure and plaintiffs' legal remedy therefor is inadequate.

31. The pleadings, affidavits, evidence and points and authorities filed in this court and received in evidence in connection with defendant's motion for preliminary injunction and plaintiffs' order to show cause show that the defendant Tanner has breached its Exclusive License Agreements, and each of them, with Avis, that such breaches were and are material and that defendant has no substantial defense to plaintiffs' Complaint.

32. The license agreements between Avis and defendant contain many affirmative covenants which by their terms contemplate a succession of acts, whose performance cannot be consummated by one transaction. The specific performance of these covenants cannot be accomplished by one order and would require continuous and protracted supervision and direction by this Court.

33. Defendant should be allowed to complete all U Drive rent-a-car agreements presently in force and effect with the public generally and made within the areas heretofore licensed to defendant, however; keeping normal and customary accounting records of the charges made and monies received or earned in connection therewith.

34. Although defendant received notice of termination on or about May 31, 1962, no action was taken by defendant to obtain a hearing or adjudication of its alleged rights, either at the time it received notice or before or after August 15, 1962, the effective date of cancellation, until 25 days after plaintiffs filed their Complaint herein.

35. A bond in the sum of $50,000.00 will adequately indemnify defendant for injury to it that might occur in the event that defendant were to obtain a decree in its favor.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the Court concludes as follows:

A. Jurisdiction of the above entitled cause exists under the provisions of 28 U. S. Code, Section 1332 and 15 U. S. Code, Section 1121.

B. Prior to November 19, 1962, plaintiffs were unable, for good cause shown, to file factual affidavits or present evidence in opposition to defendant's Motion for a Preliminary Injunction and in support of the allegations of their Complaint. As a result thereof, plaintiffs did not have a due or fair opportunity to be heard at the hearing on defendant's Motion for a Preliminary Injunction and said motion was heard on the affidavits of defendant only and without opposition by plaintiffs. The evidence relevant and material to plaintiffs' order to show cause and defendant's motion is essentially the same. By reason of the hearings herein on plaintiffs' Order to Show Cause, all parties have had for the first time a due opportunity to present oral and documentary evidence in support of their respective positions and have had a due opportunity to be heard.

C. The pleadings, affidavits, evidence and points and authorities filed herein and received in evidence in connection with defendant's motion for a preliminary injunction and plaintiffs' order to show cause show that defendant has breached its

exclusive license agreements, and each of them, with Avis, that such breaches were and are material, and that defendant has no substantial defense to plaintiffs' Complaint.

D. The written notices of termination given by Avis to Tanner were based upon the ground that Tanner had failed to pay fees required under said licensing agreements. Under the terms of said license agreements, said ground could not be cured by defendant.

E. By reason of the premises and the facts heretofore found, each of said exclusive license agreements and each of said exclusive truck license agreements between Avis and Tanner were duly terminated by Avis for cause, and as of August 15, 1962, were of no further force or effect.

F. Said exclusive license agreements and said exclusive truck license agreements are not capable of being specifically enforced.

G. The preliminary injunction heretofore granted to defendant on November 15, 1962, was in effect granted by default without a hearing on the merits and should be dissolved and the Findings of Fact and Conclusions of Law made in connection therewith set aside and vacated.

H. Plaintiffs are entitled to a preliminary injunction against defendant's continued use of the Avis trademarks and trade names and of the Avis Rent-a-Car System and the Avis Rent-a-Truck System, and the preliminary injunction as prayed for in plaintiffs' Complaint should be granted.

PRELIMINARY INJUNCTION

In accordance with the foregoing Findings of Fact and Conclusions of Law, It Is Ordered, Adjudged and Decreed:

1. That the Court has jurisdiction of the parties to the above entitled cause and of the subject matter therein involved.

2. That the preliminary injunction heretofore granted to defendant herein on November 15, 1962 be, and it hereby is, dissolved; that the Findings of Fact and Conclusions of Law filed in connection therewith be, and the same hereby are, set aside and vacated; and that defendant's bond in the amount of $25,000.00, approved on November 14, 1962, be and it hereby is exonerated.

3. That defendant, its officers, agents, attorneys, employees and representatives and each and all persons, firms, corporations or associations claiming from, under or through defendant be, and they hereby are, enjoined and restrained from using the Avis Rent-a-Car System and the trademarks and trade names "Avis," "Avis System," "Avis Rent-a-Car System," "Avis Rent-A-Truck System" or any name, sign, form or device similar thereto in connection with defendant's rent-a-car and rent-a-truck business and from advertising, renting or offering to rent any cars or trucks under said trademarks, names or devices in imitation or likeness or approximate likeness thereto which would in any manner mislead or deceive consumers or the public in general in using the services of plaintiffs' business and from advertising, using,

renting or offering to rent its cars, trucks or services in such manner to cause them to be, or facilitate their being palmed off or mistaken for the business, products and services of plaintiffs and their duly authorized licensees.

4. Defendant is hereby ordered to perform the following specific acts:

(a) To comply with all the requirements of its license agreements with plaintiffs as set forth in Section 7 thereof including the return to plaintiffs all unused Avis System Standard Rental Agreements, forms, advertising matter, operations, procedures, manuals of operation and Commercial Customer Information Sheets which have been received by defendant from plaintiffs, defendant to receive due credit therefor;

(b) To notify the principal office of the United States Post Office, the Western Union Telegraph Company for, and the telephone company serving the cities and locations in which defendant was an Avis licensee or agent, and to take such other steps as are reasonably necessary, to cause plaintiffs or licensees designated by plaintiffs to receive all mail and other communications addressed to "Avis" and "Avis Rent-a-Car System" or variations thereof, including all telephone calls;

(c) To deliver up for destruction all labels, signs, prints or pamphlets, automobile lease forms and all other documents of literature of whatsoever kind in defendant's possession bearing a reproduction, copy or colorable imitation of any trademark or trade name in defendant's possession bearing a reproduction, copy or colorable imitation of

any trademark or trade name of Avis which are not to be returned to plaintiffs pursuant to part (a) above; and

(d) To turn over to plaintiffs for execution all reservations for the renting of automobiles now held by defendant which were referred to defendant by plaintiffs or other Avis licensees, and plaintiffs shall maintain normal and customary accounting records of the cars rented, sums received and other pertinent accounting records thereof.

5. Plaintiffs are hereby ordered to file a bond or make a cash deposit, pursuant to local Rule 8(e), within five days after the entry of this preliminary injunction, said bond or deposit to be in the amount of $50,000.00 for the payment of such costs and damages as may be incurred or suffered by any party who is found to be wrongfully enjoined.

Dated: December 7, 1962.

/s/ THURMOND CLARKE
United States District Judge

APPENDIX C.

Findings of Fact, Conclusions of Law, and Preliminary Injunction Entered by Judge Peirson M. Hall, November 15, 1962.

This cause came on for hearing on the 9th day of November, 1962 before the Honorable Peirson M. Hall, judge presiding, on defendant's motion for a preliminary injunction; the court having considered the verified complaint, answer thereto, verified counter claim, motions and affidavits filed by plaintiffs and defendant, and all of the same having been offered and received in evidence and having heard oral evidence in open court, the court after due deliberation finds the facts and states the conclusions of law as follows:

FINDINGS OF FACT

I

That the amount in controversy exceeds the sum of Ten Thousand Dollars ($10,000.00).

II

That the plaintiff Avis, Inc. (hereinafter referred to as "Avis") is a Maine corporation with its principal place of business in Garden City, State of New York; that the plaintiff, Avis Rent-A-Car System, Inc. (hereinafter referred to as "System"), is a Delaware corporation with its principal place of business in Garden City, State of New York; that the defendant Tanner Motor Livery, Ltd. (hereinafter referred to as "Tanner") is a California corporation with its principal place of business in Los Angeles, State of California and that diversity of citizenship exists between all plaintiffs and defendant Tanner.

III

That for many years prior to the year 1947, defendant Tanner was in the business of renting and leasing automobiles, without drivers, to the public generally under the firm name and style of Tanner Motor Livery, Ltd

IV

That in 1945 plaintiff Avis' predecessor commenced doing business in the U-Drive car rental field under the firm name and style of Avis Rent-A-Car System and in 1947 commenced licensing others to do business and authorized the use of its registered trademarks and trade names "Avis", and "Avis Rent-A-Car System" by exclusive license agreements.

V

In 1947 defendant Tanner, at the special instance and request of plaintiff Avis' predecessor became an exclusive licensee to operate the Avis Rent-A-Car System in parts of the Southern California area and at all times thereafter refrained from using the name "Tanner" and did use the names "Avis", "Avis System", "Avis Rent-A-Car System", "Avis Rent-A-Truck System", in connection with its rent-a-car, without driver, business as a trade name and trademark licensee.

VI

That from 1956 to 1961 plaintiffs and defendant modified the previous exclusive license agreements and expanded the exclusive territory of defendant to ultimately include the cities and territories of:

(1) Beverly Hills, California

(2) Burbank, California

(3) Coronado, California
(4) Glendale, California
(5) Lancaster, California
(6) Long Beach, California
(7) Los Angeles and Hollywood, California, and the Los Angeles International Airport
(8) Plam Springs, California
(9) Pasadena, California
(10) San Diego and La Jolla, California
(11) Santa Barbara, California
(12) Santa Monica, California
(13) Las Vegas, Nevada
(14) Oxnard, California, and the Oxnard airport
(15) Ventura and Ojai, California, and the Ventura and Ojai Airports
(16) Culver City and Inglewood, California, and airports and railroad stations serving said cities
(17) South Gate, California, and airports and railroad stations serving said city
(18) Vernon, Huntington Park and Palmdale, California, and the airports and railroad stations serving said cities
(19) Disneyland, California, and the Disneyland Heliport

by the execution of nineteen separate exclusive license agreements. That said agreements are made in a standard form, a copy of which is attached to defendant's counter claim marked Exhibit "A," as amended, said amendments being truly set forth in Exhibit "B" of defendant's counter claim.

VII

That the last exclusive license agreement entered into by the parties was for Disneyland, California and the Disneyland Heliport and was executed on August 1, 1961.

VIII

That the annual gross receipts of the defendant under said agreements aggregate more than $3,000,000.00 per year and the advertising and administrative fees payable to Avis pursuant to said agreements exceed the sum of $150,000.00 per year.

IX

That the defendant presently has capital investment in excess of $3,000,000.00 devoted to its U-Drive rent-a-car business. That included in said investment, defendant owns between 850 and 1,000 automobiles and trucks, owns its own accounts receivables, counter installations, leasehold improvements and employes approximately 1,100 persons, a substantial number of which are employed in the U-Drive, rent-a-car business.

X

That the defendant Tanner has entered into numerous exclusive and non-exclusive franchise agreements for the conduct of its rent-a-car business as Avis and Avis Rent-A-Car System at various hotels, motels, resorts, railroad stations, airports and heliports and various other public facilities in the Southern California and Las Vegas, Nevada areas, including Los Angeles, California, San Diego, California, Las Vegas, Nevada, and airports serving each of said cities.

XI

That from 1947 to and including August 1, 1962 defendant Tanner had expended sums substantially in excess of $1,000,000.00 in advertising and promoting Tanner's business including the Avis U-Drive business, the greater part of which sum was expended in promoting the name and good will of Avis and Avis Rent-A-Car System.

XII

That in connection with the performance of said agreements, Tanner has entered into approximately twenty leases involving real property for the purpose of renting automobiles and trucks, said leases all being presently in effect for varying lengths of time, many of which will not expire prior to three years from November 1, 1962.

XIII

That from 1947 to May of 1962 the parties acted and operated under said exclusive license agreements without serious dispute.

XIV

That in March of 1962 controlling interest of Avis was acquired by Lazard Freres & Co. and new officers, directors and management were elected.

XV

That in May of 1962 plaintiff Avis notified defendant Tanner in writing of its intention to terminate all of the exclusive license agreements in effect then held by defendant Tanner. That upon receipt of said notices of intention to cancel said exclusive license agreements, a substantial dispute arose between the parties